In the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 74-1449

CARL L. HARVEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was denied due process because the evidence at trial was only "the bare minimum" necessary to support his conviction (Pet. 2).

After a jury trial in the United States District Court for the Eastern District of Illinois, petitioner was convicted of having received, stored, or disposed of stolen property that was a part of interstate commerce, in violation of 18 U.S.C. 2 and 2315 (Count I), and of having received, stored, or disposed of a stolen shotgun that was moving in interstate commerce, in violation of 18 U.S.C. 2 and 922(j) (Count IV).[1] He was sentenced

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[1]Count II of the indictment was severed prior to trial. Co-defendant Marcus Crawford pleaded guilty to having conspired to sell or receive stolen property that was moving in interstate commerce, in violation of 18 U.S.C. 371 and 2315, and was placed on four years' probation. Petitioner was acquitted on that charge (Count V). He was also acquitted on Count III, which charged the interstate transportation of a stolen revolver, in violation of 18 U.S.C. 922(i).

to four years' imprisonment on Count I, to be followed by four years' probation on Count IV. The court of appeals affirmed summarily (Pet. App. 1a-2a).

The evidence showed that on March 2, 1973, a number of guns, valued in excess of $5,000, were taken during a burglary from a store in Mt. Carmel, Illinois. According to the testimony of Harold Martin, petitioner asked him in early March to locate a buyer for a number of guns (Tr. 44, 48). Martin arranged to sell the guns to co-defendant Crawford. Petitioner advised Martin that these guns had been burglarized from a store in Mt. Carmel, Illinois (Tr. 48-49).[2] On March 10, 1973, petitioner and Martin drove from Illinois to Indiana to pick up the guns. After they obtained the guns, the two men returned to Illinois.[3] Martin retained three of the guns and sold the remainder to Crawford in exchange for an automobile and $2,000.[4] Martin later gave $1,800 of this amount to petitioner (Tr. 71).

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[2]Petitioner also told Martin that the weapons had been hauled by a rope through a hole in the store roof (Tr. 48-49). Other evidence established that the burglary had been accomplished by drilling a hole through the roof of the store (Tr. 14-15).

[3]Martin testified that the guns were located at a farm near Griffin, Indiana, and that when they obtained them petitioner gave the farm's owner a check for $50 (Tr. 49-51).

[4]These guns were identified as those stolen from the Mt. Carmel store (Tr. 28, 54, 88-89, 101-103, 108-112).

According to the testimony of Danny Dennis, petitioner subsequently informed him that the guns had been sold to Martin and Crawford (Tr. 35).[5] Co-defendant Crawford testified and corroborated Martin's testimony that he had purchased the stolen guns from Martin (Tr. 87-96).

Petitioner apparently acknowledges that the evidence was sufficient to sustain his conviction. His contention appears to be that it was so barely sufficient in several respects that he was denied due process. The contention is insubstantial.

1. Petitioner suggests that the evidence was barely sufficient because his conviction rested upon the uncorroborated testimony of an accomplice. While the uncorroborated testimony of an accomplice is, as petitioner concedes (Pet. 4), sufficient to sustain a conviction, it is clear that critical aspects of Martin's testimony were corroborated. The testimony of Danny Dennis also implicated petitioner. Dennis testified that petitioner told him that he could arrange a sale of stolen guns that were then in Indiana but that had been stolen in Mt. Carmel, Illinois. Petitioner later told Dennis that these guns had been sold to Martin and Crawford. Moreover, Crawford corroborated Martin's testimony that Crawford purchased the stolen guns from Martin.

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[5]Petitioner had earlier told Dennis that he could arrange a sale of 30 guns. Petitioner also told him that the guns had been stolen in Mt. Carmel, Illinois, but were then in Indiana (Tr. 32-37, 41).

2. Petitioner also argues that, since the government did not present certain evidence, it can be inferred that this evidence would have been unfavorable to the government. The government did not call as a witness the man who, according to Martin's testimony (see note 3, *supra*), had stored the stolen guns in Griffin, Indiana, and the government did not introduce into evidence the $50 check that petitioner gave the man when he and Martin picked up the guns. Having produced sufficient evidence on all elements of the offense, the government was not required, as petitioner concedes (Pet. 5), to produce additional evidence. *United States* v. *Rizzo*, 416 F.2d 734, 736 (C.A. 7). Moreover, petitioner's attorney, in his closing argument, invited the jury to draw the inference that if the government had presented this additional evidence it would have been unfavorable to the government's case (Tr. of Oct. 8, 1974, p. 16).

3. Finally, petitioner contends that the verdicts were inconsistent and that the inconsistency reflects the jury's doubts about the sufficiency of the evidence. Petitioner was convicted of having received, stored, or disposed of stolen property that was a part of interstate commerce, in violation of 18 U.S.C. 2 and 2315; he was also convicted of having received, stored, or disposed of a stolen shotgun that was moving in interstate commerce, in violation of 18 U.S.C. 2 and 922(j). He was acquitted of having transported in interstate commerce a stolen revolver, in violation of 18 U.S.C. 922(i); he was also acquitted on the conspiracy count. As petitioner concedes (Pet. 4-5), consistency in verdicts is not required. *Hamling* v. *United States*, 418 U.S. 87, 100-101. But the verdicts here were in any event not inconsistent. The counts on which petitioner was acquitted required additional proof of a conspiracy and of petitioner's interstate transportation of a specific revolver.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.